A Socio-Legal Study of Law Relating to LGBTQ in India: Needs and Challenges

Ph.D. Research Plan

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To

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by

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CERTIFICATE

This is to certify that this Ph.D. Research Plan entitled **"A Socio-Legal Study of Law Relating to LGBTQ in India: Needs and Challenges"** by Ms. Anusha Khandelwal submitted in fulfillment of the requirement for the Degree of Doctor of Philosophy in School of Law under Dr. Tulika Singh, Assistant Professor of JECRC University, Jaipur during the academic year 2022, is a bonafide record of work carried out under my guidance and supervision.

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Introduction

"A person's sexual orientation is intrinsic to their being. A classification which discriminates between persons based on their innate nature would be violative of their fundamental rights."

-Justice Indu Malhotra

For LGBTQ people, sexuality has always been a contentious theme, from the dawn of human civilization to the period of modern liberal democracy. We run into trouble when we try to talk about sexual orientation neutrally in the context of individual liberties and equal chances. When compared to the normative members of society, some groups of individuals stand out due to their sexual behaviour and customs. The answers to a number of problems stemming from the simple reality of being unique are still elusive and unproven. Since they are a minority in comparison to the majority, LGBTQ people have always had to contend with concerns like these and the stigma that comes along with them. The LGBTQ community is growing all over the globe, in countries as diverse as India, the United States, Britain, China, Japan, and others. India immediately comes to mind as the country with the greatest religious and cultural diversity in the world, a place where ancient traditions have survived into contemporary times.

The presence of Hizars and other homosexuals is not a recent discovery in India; archaeologists have discovered evidence of their existence dating back to ancient times. The identities of the heterosexual, gay, and bisexual, including the transgender, are not fixed categories. All of these things have to do with people's various lifestyles, such as their interactions with others in public, their emotional and psychological makeup, and their working practises. Homosexuality has been present in India for unknown amounts of time, but it wasn't until the first issue of Bombay Dost (a gay magazine) was released in 1980 that anyone spoke out about it. Sakhi, an organisation of lesbians, has spoken out against the ongoing abuse of their rights in this case. In today's society, transsexual people are given the same options as any other sexual orientation. Therefore, it is stated that regardless of one's gender identification, gender expression, or sexual orientation, everyone is deserving of respect and protection under international human rights law.

After the independence, to regulate the sexual behavior between Indian citizens many legislations were enacted by the Indian Parliament like, "Hindu Marriage Act, 1955, Special Marriage Act, 1954, Indian Christian Marriage Act, 1872, Child Marriage Restraint Act, 1929," and the likes, which allow and disallow too, the satisfaction of one's sexual desire in lawful and prescribed manner and natural manner. The Indian Penal Code, 1860 control the extra marital sex and forced sex by punishing it under Sections 354, 355, 375 to 377, 493 to 498 of the code. However, despite these severe penalties, rape and sodomy crimes continue to rise. Teenage pregnancies have disturbed the country's social, philosophical, and religious thinkers because of the influence of Western culture and civilization, which has long dominated and continues to dominate our culture. People with a lustful and cruel nature abuse the rights to equality, freedom, and religion to have sexual encounters however they like, regardless of the consequences to themselves, others, or the law.

Who are Sexual Minority?

In it's important to define some key concepts before discussing sexual orientation and gender identification. Frequently people use the term LGBTQ which means "lesbian", "gay", "bisexual" "transgendered", "transsexual" in describing one's sexual orientation. LGBTQ Community also known as Sexual Minority. LGBTQ persons are also sometimes referred to as the "Queer Community" or the "Rainbow Community". Here are the definitions of the terms-

***Lesbian**:* Lesbians are women who identify as gay: a woman who has romanticfeelings for or sexual inclinations towards other women.

***Gay**:* The term "gay" is most often used to describe homosexuals or homosexuality. The term "gay" is commonly used to refer to male homosexuals, but it is also sometimes applied to lesbians.

***Bisexual**:* Bisexuality include feelings of romantic interest, sexual interest, or sexual behaviour towards both males and females, as well as feelings of romantic interest in or sexual behaviour with people of any sex or gender identity.

***Transgender**:* A transgender person is one whose gender identity does not correspond with the gender they were assigned at birth. The abbreviation "trans" is commonly used to describe this phenomenon.

***Transsexual**:* Feel uncomfortable with their assigned gender or have a gender identity that is not shared by their culture.

***Intersex**:* Intersex is a condition in which a person does not clearly exhibit male or female genital or chromosomal traits.

***Queer**:* The term "queer" is used to describe people who identify as a sexual orgender minority but who are neither heterosexual nor cisgender. The term "queer" was once a derogatory term for persons who desired the same sex as themselves, but since the late 1980s, queer scholars and activists have been reclaiming the term.

The Yogyakarta Principles [1] clarify the proper application of international human rights legislation regarding sexual orientation and gender identity.

According to the preamble of the Yogyakarta Principles-

***Sexual orientation**: "refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender".*

India's constitution, on the other hand, is a social-legal document founded on a social ideology. There are two parts to any social philosophy—the fundamental and the contextual—that will evolve along with shifting societal norms and expectations. It is of paramount importance to us that our constitution protects the rights to life, liberty, and property while maintaining the inherent worth of every person in our nation. In a similar vein, Articles 37, 38, and 39 of the Constitution place a duty on states to protect and advance the rights of minorities and disadvantaged groups so that everyone can enjoy basic human dignity. Article 37 says that the states are obligated to use the principles outlined in Part IV as the basis for their own legislation. As the Supreme Court ruled in *A.K. Gopalan,*[2] DPSP are a reflection of the majority's will in the legislature to execute the paramount and permanent laws of the country through deliberative wisdom. As a result, legal changes are necessary to ensure that the LGBTQ community is treated fairly along with the rest of society.

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[1] International Commission of Jurists (ICJ), "*Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity"*, March 2007, available at: https://www.refworld.org/docid/48244e602.html

[2] *A.K. Gopalan* v. *The State of Madras,* 1950 SCR 88.

In September 2012, the *NALSA* [3] petitioned the court for a writ order demanding that transgender people be treated as a distinct gender category for the purposes of issuing legal identification documents like birth certificates, passports, driver's licenses, and identification cards and be afforded the same legal protections and civil liberties as any other citizen. For this reason, the Supreme Court ruled that transgender people fall under the protections of Articles 14, 15, and 16 because discrimination based on gender identification should be abolished. Accordingly, the court's decision to expand the definition of "sex" in Articles 15 and 16, which previously only included "biological sex of male and female," to include "psychological sex" or "gender identity," is significant. The Court has also made it clear that discrimination based on a person's sexual preference is prohibited. In this accordance *the Right of Transgender Persons Bill 2014*,[4] first introduced by DMK member Tiruchi Shiva calls for equal rights and reservation for transgender persons. Further, in pursuance of the resolutions and recommendations of Yogyakarta Principles, the Government of India framed a bill known as "*the Transgender Persons (Protection of Rights) Bill, 2019.* It was introduced in Lok Sabha on July 19, 2019 by the Minister for Social Justice and Empowerment, Government of India, Mr. Thaawarchand Gehlot". This means that as of the 5th of December, 2019, the Transgender Persons (Protection of Rights) Act, 2019 (Act No. 40 of 2019) has come into effect. An Act to ensure the safety and protection of transgender people and to address issues related thereto.

All citizens are guaranteed protection from the State's arbitrary power under a system founded on the rule of law. Although only humans are the beneficiaries of all human rights, India is a signatory to a number of international human rights charters and accords. The issue of whether or not "human" only refers to males and females arises now. What happens to LGBTI rights if the response is no? Do you not consider them to be human? Furthermore, various international charters and conventions exist to protect the rights of those who identify as lesbian, gay, bisexual, transgender, or queer: "Article 12 of the Universal Declaration of Human Rights 1948, Article17 of the International Convention on Civil Political Rights 1966, and European Convention on Human Rights 1950".

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[3] *National Legal Services Authority* v. *Union of India & Ors.*, 2014 5 SCC 438.
[4] Available at: http://www.prsindia.org/

Many Indians, inspired by the success of the gay rights movement in the West, have petitioned the country's higher courts to declare section 377 of the Indian Penal Code unconstitutional and thus grant legal recognition to their homosexual partnerships under Articles 14, 15, 21, and 25. By declaring several cases from the High Courts unconstitutional and in "violation of fundamental rights of Equality, Freedom, and Religion", the Supreme Court has given new dimensions to this movement and new shape to Criminal and Constitutional law. This victory came in the case of *Navtej Singh* [5], which was decided in 2018. However, in India, the paradox of our society has long meant that stories about the humiliating treatment of LGBTQ people in the family, society, and state, as well as at their workplace, and the termination of employment and turning out from family, were commonplace in daily newspapers on both the national and local levels long before the *Navtej Singh Johar case*. Therefore, it is challenging to reconcile and coordinate our desire to embrace western culture with our inherent conservatism and fundamentalism. Therefore, the researcher decided to focus on the plight of LGBTQ people because she was moved by the tragic circumstances they experience on a daily basis.

Literature of Review

A literature review is devoted to summarising the key findings and studies that have already been done on the problem at hand. This literature review summarises the current state of knowledge in the area of investigation, allowing the reader to grasp the concepts related to the present study on "A Socio-Legal Study of Law Relating to LGBTQ in India: Needs and Challenges" well as the appropriate methodologies, research designs, and techniques of the said analysis used by the various researchers till today.

Books:

Arvind Narrain and Alok Gupta, *Law Like Love: Queer Perspectives on Law*, Yoda Press, New Delhi, 2011: As citizens of a democratic nation, we have a responsibility to ensure that the current democratic framework does not permit discrimination based solely on gender identity or sexual behaviour. LGBTQ politics is not just about evaluating the rights of individuals who identify as members of sexual minorities; it's also about challenging the systems that restrict the full expression of human potential.

1. Arvind Narrain, *Queer: Despised Sexuality Law And Social Change*, Books for Change, Bangalore, 2004: Even though I don't have the answers, I think these issues are very important. Since colonial times, the legal system has been central to the persecution of LGBTQ people. Can liberatory politics utilise legislation as a tool? Where do advocates for minority rights stand today, and what obstacles do they face? What sort of law firm prepares its clients for such difficulties?

2. B. Shiva Rao, *The Framing of India's Constitution : Select Documents*, Vol. II, Universal Law Publishing, New Delhi, 2015: With its discussion of India's Constitution's creation, this book also provides readers and scholars with access to the original texts of all Constitutional Amendments and Constitution Commission and other reports relevant to the subject at hand..

[5] *Navtej Singh Johar* v. *Union of India,* 2018 S.C.C. Online S.C. 1350.

3. B.M. Gandhi, *Indian Penal Code*, EBC Publishing Pvt. Ltd., Lucknow, 2018: Lesbianism defines unnatural sexual practice between women. In United Kingdom probably it's never been criminalized except in some Cases like indecent behavior in the public. And imputation of lesbian is actionable as defamatory statement.

4. D.D. Basu, *Introduction to the Constitution of India*, LexisNexis, 2018: According to the Universal Declaration of Human Rights, discrimination based on a person's sexual orientation is prohibited. In "Articles 1 and 2, the Declaration" addresses the rights of individuals with regard to the elimination of sex-based prejudice in relation to people of diverse gender identities.

5. Gautam Bhatia, *The Transformative Constitution***,** HarperCollins Publishers, Noida, 1st Edn., 2019: It has been brought to light in this book that the Constitution's implementation over the past seven decades has often fallen short of its transformative promise, and that succeeding Parliaments have failed to repeal colonial-era laws that run counter to the principles of the Constitution. The Supreme Court has, in fact, relied on colonial-era legislation in a number of recent cases. Aadhaar (Epilogue) and the privacy case bail applications of Kabir Kala Manch before the Supreme Court are two prominent instances of constitutional challenges to governmental policies in India.

6. Gooch, G.T., *English Democratic Ideas in the Seventeenth Century*, New ed. by H.J. Laski, Cambridge, Eng. 1927: This book makes a valuable addition to the study of political thought and provides illustrative examples from seventeenth-century England.

7. H.O. Agarwal, *International Law and Human Rights*, Central Law Publications, Allahabad, 2017: The work has brought attention to the significance of human rights on a global scale as well as a local one.

8. Howard Davis, *Human Rights and Civil Liberties*, Routledge, Taylor & Francis Group, 2003: Independence in sexual behaviour Biological sex is often cited as the most influential and definitive criterion by which a human being is understood. When attempting to define a human being, it is impossible to ignore sexuality and sexual behaviour. Issues of the deepest and

most private nature are at the heart of it. From this vantage point, sexuality has nothing to do with the public interest or the common good because it is intrinsically connected to the idea of the private individual, and the role of the law is highly questionable. Neither sexual companions nor their activities should be subject to legal restrictions. Certainly, the right to personal autonomy is viewed as a basic human right.

9. *UN Human Rights Office of the High Commissioner*, 2012: Those who are cruel and humiliating towards LGBTI people should cease. Under international law, every nation must ensure its citizens are shielded from "torture and other forms of inhuman or degrading treatment".

Article:

1. Alok Gupta, "*Section 377 and the Dignity of Indian Homosexual",* Economic and Political Weekly 41(46), 2006 : The focus of this research is on how severely sodomy is punished in India. In addition to covering homosexuality in general, Section 377 is not just a rule about anal sex. In addition to bringing the gay community out of the closet, the decriminalisation of sodomy will also help restore the dignity of homosexuals. In this way, the piece illuminates the scope of the LGBTQ movement in India.

2. Puspesh Kumar, *"Queering Indian Sociology- A Critical Engagement",* Centre for the Study of Social System, New Delhi 2014: Indian sociology has not yet completely incorporated the issue of cast, class, ethnicity, or LGBTIs, and similarly, many other aspects of power, servitude, and the voice of descent do not have a home in Indian sociology. Given that heterosexuality has consequences for sexual orientations that don't align with one's own, it's important for Indian sociologists to consider whether or not sexual promiscuity poses a threat to society.

3. Danish Sheikh, *"Queer Rights and the Puttaswamy Judgement",* Economic and Political Weekly, Vol. 52, 2017: The Puttaswamy decision is a major step forward for future law interventions protecting LGBTQ people, and is thus a useful tool for gay rights activists.

4. Douglas Sanders, *"Section 377 and the Unnatural Afterlife of British*

Colonialism in Asia", Asian Journal of Comparative Law 4(1), 2009: In line with UDHR principles, the researcher has argued that modern decriminalisation stems primarily from human rights.

5. Janet E. Halley, *"Sexual Orientation and the Politics of Biology : A Critique of the Argument from Immutability",* South African Law Journal, 1993: The researcher's argument that gay people and their actions merit legal protection lends credence to the cause.

6. John A. Robertson, "*Gay and Lesbian Access to Assisted Reproductive Technology",* Western Reserve Law Review, 2004: Anti-gay laws and discrimination in the workplace are just two of the obstacles that the LGBTQ community has had to overcome in the past. To solve the new generational damage issue, I am fully behind the idea that homosexual and lesbian parents should have the same rights as heterosexual parents when it comes to evaluating assisted reproductive options and raising their children.

7. Jose Gabilondo, "*Irrational Exuberance About Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction",* Boston College Third World Law Journal, 2008: Chief Justice Kaye concluded that there is significant interest in the question of whether or not homosexuals should be allowed to marry because, among other things, homosexuals are a suspect class, their exclusion from marriage stems from sex-based discrimination, and whether or not marriage is a basic right.

8. M.P. Singh, "*Constitutionality of Section 377, Indian Penal Code- a Case of Misplaced Hope in Courts",* NUJS Law Review, 2013: Concern with human rights principles led the court to examine the prosecution and basis of punishment under provision of IPC 1860, and they found that all these cases linked to consensual intercourse between adults have been determined regardless of age and consent.

9. Michael O'Flaherty and John Fisher, "*Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles",* Human Rights Law Review, Volume 8, Issue 2, 2008- The states must ensure the safety of their citizens' rights. This article is the first of its kind to provide a critical analysis of the concepts. As a result, it sets an

important precedent in the fight for the equal rights of the LGBTQ community around the globe.

10. Nancy J. Knauer, "*LGBT Elder Law: Toward Equity in Aging",* Harvard Journal of Law and Gender, Vol. 32, 2009: The LGBT community has never before had such widespread social acceptance or legal protection. Still today, many LGBT seniors face the difficulties of ageing without the help of conventional ageing initiatives, or even the company of their own families or the broader LGBT community.

11. Pushpesh Kumar, *"Queering Indian Sociology: A Critical Engagement"*, E-journal of the Indian Sociological Society, 2014: In my opinion, the sexual and salacious aspects of human existence are some of the most private problems that society in India fails to address. The field of sexuality studies is underdeveloped in India.

Cases:

1. *Navtej Singh Johar* v. *Union of India,* 2018 S.C.C. Online S.C. 1350 case on 6th Sep, 2018. The court ruled that Section 377 is unconstitutional because it criminalises all sexual acts, including those that involve consenting adults. The Supreme Court reached a majority decision, striking down provisions of state law that criminalised sexual cohabitation between consenting adults.

2. *National Legal Services Authority* v. *Union of India and Others,* (2014) 5 S.C.C. 438 case: In September 2012, a writ petition was filed demanding transgender people be granted equal rights and protection, recognised as a third gender, and given the same privileges as cisgender people when it came to obtaining official documents such as ration cards, voter IDs, passports, and driver's licences.

3. *Suresh Kumar Koushal* v. *Naz Foundation,* (2014) 1 SCC 1: The Delhi High Court's conclusion that Article 377 of the Indian Penal Code was unconstitutional was overturned by the Apex Court.

Conventions and Legislations:

1. **Yogyakarta principles:** According to Yogyakarta's second principal, everyone has "the right to equal treatment and protection under the law", regardless of their sexual orientation or gender identity. Whether or not another human right is also impacted, everyone has the right to be treated equally before the law and to receive equal protection under the law. The law should make it illegal to treat people unfairly and should provide everyone with equal and efficient protection from discrimination. Negative treatment based on sexual orientation or gender identity.

2. **Universal Declaration of Human Rights 1948:** In violation of Article 12, no one may suffer threats to his or her personal safety, family, house, or correspondence, or defamation of character. Everyone has the right to be safe from any kind of assault or interference by the state.

3. **International Convention on Civil Political Rights 1966:** Article 17, says that "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks".

4. **European Convention on Human Rights 1950:** According to Articles 1 and 2, as well as Article 8 of the same document, all member states are obligated to uphold human rights and ensure, without exception, the right to life, the right to privacy, and the freedom to enjoy all human rights to all people within their borders.

5. **Indian Constitution:** Article 51 of the Indian Constitution seeks to elaborate on the document's underlying ideas (DPSP). However, we have not yet fully implemented these principles in light of the fact that LGBTQ people are human beings first and foremost. What we need to know now is why it has been so difficult to put those ideals into practise in terms of LGBTIs. If our foreign obligations require that we adopt such principles, would we need to amend our laws and constitution?

6. **DPSP of Indian constitution:** Articles 37, 38, and 39 guarantee the rights of

minorities and the economically and politically disadvantaged so that they may enjoy full human respect. It is the responsibility of the states to apply the principles outlined in Article 37, which declares that the principles outlined in Part IV are fundamental to the governance of the nation. According to the Supreme Court's decision in A.k. Gopalan, the DPSP reflect the majority vote of legislators exercising the nation's collective knowledge when enacting the country's supreme and permanent laws.

7. **The Right of Transgender Persons Bill 2014:** This bill, introduced by DMK member Tiruchi Shiva, would guarantee transsexual people the same protections and quotas as any other group. Under Articles 14, 15, and 16, the Supreme Court has declared that transgender people are guaranteed protection from discrimination based on their gender identity. Therefore, the scope of the term 'sex' under Articles 15 and 16 has been expanded to include 'psychological sex' or 'gender identity,' it was only allowed for biological males and females before. The Supreme Court has also made it crystal clear that sexual orientation discrimination is illegal.

8. **Right of Transgender Persons (Protection of Rights) Bill 2019:** In response to the Yogyakarta Principles' suggestions and resolutions, the Indian government has drafted the Right of Transgender Persons Bill 2019. On July 19, 2019, Mr. Thaawarchand Gehlot, India's Minister for Social Justice and Empowerment, presented it in Lok Sabha. The term include in it's ambit "trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra. Similarly, intersex variations is defined to mean a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body".

Justification for Selection of Research Area /Topic

Keeping in mind the specific needs of marginalized community of LGBTQ regarding their sexual practices and also their unique gender identity it become imperative to conduct of the examination of issues faced by the community in the legal domain. For over a century, scholars of Indian law have debated how to handle cases involving people who present with gender nonconformity or sexual orientation that falls outside the norm. The Indian Penal Code 1860 includes provisions for dealing with the sexual orientation of sexual minorities (LGBTQs), but enforcing these provisions falls under the purview of the State executive, so violations of the rights of LGBTQ people continue to occur. Those who identify as LGBTQ live among the rest of us, and their actions, both for and against, have consequences for their loved ones and for society at large. This reality highlights the need for protective legal measures for this group. Unfortunately, the current legal framework does not do enough to ensure a just and secure society while also safeguarding the rights of the LGBTQ community. The incorporation of the amended provisions with specific reference to persons of different sexual behaviour and different gender identity will greatly benefit the Indian criminal justice system, and their effective implementation should follow to significantly reduce "the violation of the fundamental rights of LGBTQ people". As a result of the findings of this study, policymakers will be better able to move forward with amending the Indian constitution to grant the status of LGBTQs as a group to safeguard their rights. Those who identify as LGBTQ live among the rest of us, and their actions, both for and against, have consequences for their friends and family and for society as a whole. When weighing the need to uphold law and order against the importance of ensuring the protection and respect of the LGBTQ community, the current body of legislation falls short. This study is motivated by a desire to uphold the international human rights treaties that require states to enact policies that are consistent with their founding ideals.

Research Area

1. Personal Law.
2. Constitutional Law.
3. Criminal Law.
4. Laws in relation to human rights which are related to persons of different gender identity and different sexual behaviour at international level.

Case Laws: Case laws of different jurisdictions for better understanding and to analyze related provisions of fundamental rights of LGBTQs in India.

Research Objectives

1. To study the socio-economic status of LGBTQs in India and trace the history and evolution of LGBTQ in details.
2. To critically examine the issue related to gender identity.
3. To draw the optimal mechanism for protection of human rights to meet out international obligation related to LGBTQs.
4. To discuss the International Strategies on the LGBTQs Dignity.
5. To discuss the role of the Legislature and Judiciary in recognition of the issues and Protection of the Fundamental Rights of the LGBTQs.
6. To attract the cynosure of the society to understand the pathetic conditions of the LGBTQ people so as to treat on par with them as their fellow human beings with the milk of human kindness sans any discrimination.

Research Methodology

The researcher will analyze the existing laws and constitutional provisions to check whether they are adequate to provide protection to the LGBTQ people in India. This Research Plan will takes a doctrinal approach to research by employing a "queer methodology" focused on issues of civil liberties. This Research Plan is a product of the author's extensive useof both primary and secondary materials.

- The primary sources include international instruments: legislation and case laws.
- The secondary source comprise of a number of books, articles published in journals, magazines and newspapers, reports and internet sources.

Expected Outcome /Hypothesis

1. The human rights provisions under the national and international instruments have not ensured required protection to the LGBTQ.
2. It requires reform in order to gender identity and sexual orientation with effective implementation.

Work Plan / Time Lines

The proposed research study comprises of seven chapters of the following captions:

Chapter-I Introduction

Chapter-II Legislative Trend in India

Chapter-III Judicial Trend in India

Chapter-IV Position of LGBTQ Community in India

Chapter-V Position of LGBTQ Community in USA, UK & EU

Chapter-VI Conclusion and Suggestions

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